No. 10110

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

ROBERT EARL HOPPER,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

Brief For The Appellee

FRANK E. FLYNN,
United States Attorney,
District of Arizona

E. R. THURMAN,
Assistant U. S. Attorney

Attorneys for Appellee.

REPUBLIC AND GAZETTE COMMERCIAL PRINTERY, PHOENIX, ARIZONA

INDEX

TABLE OF AUTHORITIES

CASES

CODES AND STATUTES

MISCELLANEOUS

APPELLANT'S AUTHORITIES DISCUSSED

No. 10110

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

ROBERT EARL HOPPER,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

Brief For The Appellee

STATEMENT OF THE CASE

An indictment was returned on December 12, 1941, charging the appellant with failure to perform the duty required of him under the Selective Training and Service Act of 1940 (50 U.S.C. 311), in that he failed to report as a conscientious objector for civilian work of national importance when required so to do by his local draft board (T.R. 2).

The figures in parentheses following the letters T.R. refer to pages in the Transcript of Record.

A motion to quash the indictment was denied February 17, 1942 (T.R. 6).

The case was tried to a jury and on March 28, 1942, the appellant was found guilty as charged (T.R. 13). Notice of appeal was filed April 6, 1942 (T.R. 14, 16).

QUESTIONS PRESENTED

1. Whether the indictment is defective.

2. Whether the Court erred in the admission of certain evidence.

3. Whether the Selective Training and Service Act of 1940 is unconstitutional.

There is no question as to the sufficiency of the evidence, and no such question can be raised for the reason that all of the evidence is not included in the record of the appeal.

The statement of the case in Appellant's Brief shows facts sufficient to support the verdict (App. B. 1-2).

When appellant registered under the Selective Service Act he was classified by the Local Board as IV-E, and thereafter ordered to report for work of national importance under civilian direction (App. B. 1). Appellant refused to report (App. B. 2).

SUMMARY OF ARGUMENT

In answering appellant's argument we will discuss the points raised in the order in which they are taken up in Appellant's Brief.

ASSIGNMENT OF ERROR NO. 1

This assignment has to do with the sufficiency of the indictment. That an indictment must charge each and every element of an offense is a well established principle of law. The authorities cited by appellant (App. B. 9) merely reaffirm this principle.

In *Harris v. United States, 104 Fed. 2d 41,* cited by Appellant, the indictment was not in the wording of the statute and failed to allege an important element of the offense, namely, that the false entry was made in any record which defendant was required to keep in connection with his official duties.

In *United States v. Britton, 107 U.S. 655* (App. B. 10), the indictment failed to plead an exception stated in the enacting clause of the statute. No such question is raised in the present case.

The other cases cited by appellant on this point state correct principles of law but are not helpful in the application of the law to the present case. The indictment in question contains allegations of all the elements of the crime. It alleges that appellant registered under the Selective Service Act, that he was classified by the Board as a conscientious objector, and was found fit for general service. The offense charged is that he failed to perform a duty required of him, namely, to report for civilian work of national importance when notified so to do.

50 U.S.C. 311.

This offense is directly alleged in the indictment (T.R. 1-2).

The indictment was sufficient under the provisions of Title 18 U.S.C. Section 556, and the authorities cited in the note. It fully informs the appellant of the nature of the charge so as to enable him to prepare his defense. It was also sufficiently definite to support a plea of former acquittal or conviction against another charge for the same offense.

Moore v. U.S., 128 Fed. 2d 974.
Zuziak v. U.S., 119 Fed. 2d 140 (9 Cir.).
Graham v. U.S., 120 Fed. 2d 543.

In the 9th Circuit case just cited the accused was charged with failure to present himself for and submit to registration and selective compulsory military training as in the Act provided. The indictment did not designate the place where he failed to present himself nor are the regulations referred to. The indictment was upheld by this Court.

We will follow appellant's example and discuss the question of the unconstitutionality of the law under Assignment of Error No. XII, which is based on the motion for a directed verdict.

ASSIGNMENTS OF ERROR NOS. II TO XI, INCLUSIVE (T.R. 25-30)

These assignments have to do with the appellant's objections to the admission in evidence of Government's Exhibits 1 to 9, inclusive.

Assignment of Error No. II (T.R. 26):

This assignment refers to Government's Exhibit No. 1, which is a registration card and one of the records required to be kept by the Local Selective Service Board (T.R. 36). There is no dispute or question in

this case as to appellant's registration. The only objection made to this exhibit was that it was not properly identified (T.R. 37). The witness Bigaouette, who was clerk of the Board, sufficiently identified the exhibit (T.R. 36-37).

Assignment of Error No. III (T.R. 27):

Government's Exhibit No. 2 is a classification record covering the appellant (T.R. 41). All entries in this exhibit were made by the witness Bigaouette (T.R. 42) or the witness Dise (T.R. 110-111) while each was clerk of the Local Board.

Assignment of Error No. IV (T.R. 27):

Government's Exhibit No. 4 (T.R. 47) is a public document, being a record in the Selective Service office showing the classification of IV-E, this record to be made in quadruplicate when a registrant has been placed in Class IV-E (T.R. 48), and is to be mailed to registrant five days prior to the time when the registrant must report for assignment to camp (T.R. 49). This was done (T.R. 49) and an entry to that effect made in column 16 of Government's Exhibit No. 2 (T.R. 40).

Assignment of Error No. V (T.R. 28):

Government's Exhibit No. 5 (T.R. 52-57) was a form sent to appellant with Exhibit No. 4 and also sent to the examining physician, and when returned to the office was kept as a part of the record (T.R. 51) and is the basis for appellant's classification (T.R. 51). The signature of the chairman of the Board was placed on this instrument after it was returned to the Board (T.R. 51). There is nothing in the exhibit prejudicial to appellant. It is merely one of the steps in his classification. We can find no objection in the record to Ex-

hibit No. 5, although counsel took an exception after its admission (T.R. 58).

Assignment of Error No. VI (T.R. 28):

Government's Exhibit No. 6 (T.R. 58-59) is merely a blank form of the notice mailed to appellant on December 12, 1940 (T.R. 59). It was introduced for the purpose of showing the form used. The original, having been mailed, was presumably in the possession of appellant and necessarily not available to the Government.

Assignment of Error No. VII (T.R. 28):

Government's Exhibit No. 7 (T.R. 60) is a letter asking for blanks for conscientious objectors. Appellant, in his brief at page 12, erroneously describes Exhibit No. 7 as a conscientious objector's form. This letter contains nothing that could be prejudicial to appellant and purports to be a request from him; but whether it was or not, it was the basis for the action of the Board in mailing to appellant Government's Exhibit No. 8 (T.R. 71).

Assignment of Error No. VIII (T.R. 29):

Government's Exhibit No. 8 (T.R. 71) was admitted in evidence without any objection (T.R. 71-72), although an exception was taken after its introduction.

Assignment of Error No. IX (T.R. 29):

Government's Exhibit No. 9 (T.R. 72) is a carbon copy of a letter identified by the witness Bigaouette, who testified he signed the original and enclosed it with Exhibit No. 8 (T.R. 73). It was clearly admissable as evidence of the action of the Board.

Assignment of Error No. X (T.R. 29):

Government's Exhibit No. 3 (T.R. 86-107) is a Selective Service questionnaire identified by the witness Bigaouette as having been mailed to the appellant (T.R. 45-46), and received back in the office. This exhibit was further identified by the witness Dise as being part of the record taken over by him when he succeeded Bigaouette as clerk (T.R. 107). Dise further identified the entry of January 3, 1941 (T.R. 107), as having been made by the chairman of the Board (T.R. 108), and the entry of December 7, 1941 (T.R. 107), as having been made by a member of the Board (T.R. 108). This exhibit was a public record and admitted in evidence to show one of the steps in the registration of appellant, and was properly admissible for that purpose.

Howenstine v. U.S., 263 Fed. 1-6.

Assignment of Error No. XI (T.R. 30):

Government's Exhibit No. 2-B is that part of Government's Exhibit No. 2 (T.R. 40) for Identification not included in the evidence as Government's Exhibit No. 2-A (T.R. 109), and is the remainder of the classification record which was identified by the witnesses Bigaouette and Dise, the entries designated as 2-B being made by the witness Dise (T.R. 110-111).

All of the exhibits discussed in Assignments of Error Nos. II to XI were public records and constitute a history of the proceedings before the Local Board. In view of the statement in Appellant's Brief, pages 1-2, there is no question in this case as to the sufficiency of the evidence. Appellant was registered, qualified and notified to report for work of national importance. He refused to report (App. B. 2). Under those circum-

stances there is nothing in the exhibits introduced in evidence prejudicial to the appellant. The documents were admitted as public records and were identified by the persons in charge of the office.

Howenstine v. U.S., 263 Fed. 1-6-7 (9 Circuit).
Johnson v. U.S., 126 Fed. 2d 242-246.

ASSIGNMENT OF ERROR NO. XII (T.R. 30)

This assignment is based upon appellant's motion for a directed verdict. The sufficiency of the indictment and the constitutionality of the Selective Service Act are attacked. The question of the sufficiency of the indictment is discussed under Assignment of Error No. I.

Appellant attacks the constitutionality of the Act on several grounds:

1. That it prohibits the free exercise of religion;
2. That it would deprive appellant of liberty and property without due process of law in that it is a delegation of legislative powers;
3. That it relegates appellant to involuntary servitude not as punishment for crime; and
4. That the Board acted arbitrarily and capriciously in classifying appellant.

There is no merit in any of the foregoing contentions.

United States v. Herling, et al., 120 Fed. 2d 236.
Selective Draft Law Cases, 245 U.S. 366.
Goldman v. U.S., 245 U.S. 474.
O'Connell v. U.S., 253 U.S. 142.
United States v. Stephens, 245 Fed. 956.

The cited cases discuss all the points raised by appellant and dispose of them contrary to the position taken by appellant. I shall quote but from one of the cases cited.

> "The power of Congress to raise armies, like the power to declare war, is unconditional, unqualified and absolute; and Congress is the exclusive judge of the necessity for the exercise of the power and of the means and manner prescribed by it for its exercise."
>
> United States v. Stephens, supra.

It seems to me that unless we accept this statement as correct, then is our nation built not upon the enduring rock but upon the sands, to be washed away by the first wave of opposition from within or from without, and our great democratic institutions are but houses of cards to be blown away by the first zephyr of dissension or dissatisfaction.

In support of the right of conscription, more properly called Selective Service, we give the following reference to Scripture, so strongly relied upon by appellant:

> Num., Chapter 1, Verses 2-3.
> Num., Chapter 31, Verses 3-6.

Exemptions:

> Deut., Chapter 20, Verses 5-7.

The question in the fourth ground above stated is found in Appellant's Brief, page 19, paragraph (d).

The appellant did not exhaust his remedies provided by the Act. He claims the Board acted arbitrarily

and capriciously in classifying him IV-E. He took no appeal from the classification by the Board.

> "* * * a registrant cannot come to a court for such relief until he has exhausted all available and sufficient administrative remedies for such arbitrary action."

Johnson v. U.S., 126 Fed. 2d. 242-246.
United States v. DiLorenzo, 45 F. Supp. 590.
Fletcher v. U.S., 129 Fed. 2d 262.
Rase v. U.S., 129 Fed. 2d 204.

SUMMARY

The indictment was sufficiently definite to inform appellant of the nature of the charge and to support a plea of former jeopardy.

The constitutionality of the Act of Congress which appellant is charged with violating has been upheld by all of the authorities.

Appellant's Brief admits proof of facts sufficient to establish all elements of the crime.

Appellant had a fair and impartial trial, and the verdict and judgment should be affirmed.

Respectfully submitted,

FRANK E. FLYNN,
United States Attorney,
District of Arizona.

E. R. THURMAN,
Assistant U. S. Attorney.

Attorneys for Appellee.